SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 22 | Issue 3

1971

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I. INTRODUCTION

A LOOK at the philosophical basis for academic tenure reveals an attempt to advance academic freedom through the protection of capable educators.[1] As succinctly stated by an Arizona court:

> [T]he broad purpose of teacher tenure is to protect worthy instructors from enforced yielding to political preferences and to guarantee to such teachers employment after a long period of satisfactory service regardless of the vicissitudes of politics or the likes or dislikes of those charged with the administration of school affairs.[2]

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This philosophy, however, has become lost in a morass of pragmatic attitudes.[3] Rather than serving solely to achieve the greater end of academic freedom, the concept of tenure has become a vehicle by which diverse interest groups may further their individual aims: To the novice

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[1] For the evolution of the concept of academic freedom as the basis for academic tenure, see R. HAFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1969).

In 1940, representatives of the Association of American Colleges and the American Association of University Professors formulated the following definition of academic freedom:

> (a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
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> (b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
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> (c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman. *Academic Freedom and Ten-*

teacher who has just been baptized by the waters of the meandering stream of standards for professorial success, the bestowing of tenure may serve as a means to gain recognition of tutorial excellence from his peers. To the academic administrator, tenure may serve as a carrot to extract from the nontenured faculty member further performance toward the nebulous perimeter of pedagogical accomplishment.[4] To a state legislator, the tenure system of state-supported institutions may serve as a political issue which he uses to exhort his wage-earning constituents into believing that this sanctuary for incompetents, social misfits, and subversives must be statutorily expunged from the educational system.[5]

Furthermore, even when viewed as a means by which to achieve academic freedom, the scope of academic tenure is severely delimited. Since academic freedom does not rest on a theory of special privilege or individual right (but rather on the hope for social progress through the unfettered spirit of inquiry), only those who have been granted tenure will carry the shield enabling them to better exercise academic freedom. The nontenured faculty member who choses to exercise such freedom remains virtually unprotected. Having invoked the displeasure of the university administrator, he may find his relations with the institution seriously impaired or his employment contract not renewed. In short, academic tenure is no more than an artificial line of demarcation which, until reached, leaves the novice faculty member insecure in his exercise of academic freedom.

A survey of recent case law, however, reveals that the problem has not gone unrecognized. With an increasing willingness of the courts to apply certain constitutional protections — hereinafter referred to as "constitutional tenure" — the nontenured staff member need no longer refrain from exercising academic freedom. Nontenured faculty dismissals or nonretentions that in the past would

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ure: *Basic Statements*, in ACADEMIC FREEDOM AND TENURE 33, 35-36 (L. Joughin ed. 1969).

[2] School Dist. v. Superior Court, 102 Ariz. 478, 480, 433 P.2d 28, 30 (1967).

[3] *See generally* R. HAFSTADTER & W. METZGER, *supra* note 1.

[4] Tenure is essentially the application of civil service to the teaching profession. *See* McSherry v. City of St. Paul, 202 Minn. 102, 277 N.W. 541 (1938).

[5] The plenary power of state legislatures over education applies also to teacher tenure unless limited by constitutional provisions. Taylor v. Board of Educ., 31 Cal. App. 2d 734, 89 P.2d 148 (Dist. Ct. App. 1939). Even where constitutional provisions seemingly control teacher employment, courts have construed tenure statutes so as not to be in conflict with those constitutional provisions. *See, e.g.*, State *ex rel.* Glover v. Holbrook, 129 Fla. 241, 176 So. 99 (1937); McQuaid v. State *ex rel.* Sigler, 211 Ind. 595, 6 N.E.2d 547 (1937); State *ex rel.* Bishop v. Board of Educ., 139 Ohio St. 427, 40 N.E.2d 913 (1942); Malone v. Hayden, 329 Pa. 213, 197 A. 344 (1938).

have been upheld as consistent with the tenure system might be found to be unconstitutional today. The concept of "constitutional tenure" and the protection it affords the nontenured teacher will be discussed below; however, before doing so, brief consideration will be given to tenure systems in general.

II. TENURE SYSTEMS

Generally speaking, formal tenure systems are employment security devices. Upon an academic administrator's determination that a particular teacher has sufficiently developed himself during a prescribed probationary period, the reward of tenure may be granted. Once tenured, the faculty member's continuation of satisfactory service limits and qualifies the power which the governing body of the institution would ordinarily possess to terminate employment.[6] Only upon satisfaction of certain procedural safeguards[7] and a showin of good cause will a tenured teacher suffer dismissal.[8] The prescribed requirements for attaining tenure and the protections afforded thereby may be derived from either statute or contract.

A. *Statutory Tenure*

The vast majority of states have tenure statutes.[9] The provisions, however, may vary from state to state in accordance with the parti-

[6] Such a system of protection has negative as well as the obvious positive aspects. To the young, aggressive teacher, tenure is often a secondary substitute for promotion and salary. For the administration, such bureaucratic security may attract teachers who are seeking permanent employment with minimum performance demands. In addition, the administration, at the risk of invoking publicity, expense, and the hostility of professional teachers' groups, may be reluctant to effect the procedures required under the tenure system to dismiss a tenured teacher. Furthermore, in the relatively short period allowed for the decision of whether to grant tenure, the teacher has only recently adjusted to his position and the administration has not yet been able to evaluate his now stabilizing performance. Nevertheless, "[w]hatever its shortcomings, it is generally agreed that tenure does achieve two desirable objectives: it protects good teachers from unjust dismissal and it provides an orderly procedure to be followed in the dismissal of incompetent members of a professional staff. These are objectives of major dimensions in the administration of staff personnel." L. PETERSON, R. ROSSMILLER & M. VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION 530 (1969). Moreover, the main purpose of a tenure system — to help create and maintain an atmosphere conducive to the development of academic freedom — is generally viewed as outweighing its disadvantages. *See* Byse & Merry, *Tenure and Academic Freedom*, in CHALLENGE AND CHANGE IN AMERICAN EDUCATION 313-28 (S. Harris ed. 1965); Machlup, *In Defense of Academic Tenure*, in ACADEMIC FREEDOM AND TENURE 306, 312-28 (L. Joughin ed. 1969).

[7] *See* notes 18-26 *infra* & accompanying text.

[8] *See* text accompanying notes 12-17 *infra*.

[9] *See* NATIONAL EDUCATION ASS'N OF THE UNITED STATES, RESEARCH DIV., TENURE AND CONTRACTS 33-38 (1969).

cular type and level of institution at which a person teaches.[10] Primarily, the tenure statutes are applicable to teachers at the public elementary and high school levels.[11] The public university teacher is usually not covered, or if he is, he is treated under separate statutory provisions. The educators of private insititutions never fall under the protective umbrella of tenure statutes.

Under the state tenure statutes a teacher may be required to complete a probationary period of anywhere from 2 to 5 years. If after that time the school wishes to continue the teacher's employment, he will be given a contract, nonterminable until retirement. Unless the faculty must be reduced or good cause is shown, the faculty member will retain his position.[12]

Where termination of an employment contract is sought on the basis of good cause, the reasons most commonly given are "incompetency,"[13] "immorality,"[14] "insubordination,"[15] "physical or mental unfitness,"[16] and "neglect of duty."[17] These substantive standards, although somewhat broad and vague, provide a form of protection from arbitrary dismissal by defining legal standards which are subject to judicial review. In addition, to insure that the judicial review is more than a posthumous inquest, the typical statute allows for procedural safeguards in the form of (1) written notice of the intended sanction,[18] (2) a formal written statement of the charges,[19] and (3) a right to request an open or closed hearing before the board

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[10] "The general rule is that only those positions enumerated in the tenure statute are encompassed by its provisions. Thus locally-created positions with titles not set out in the statute are not covered. Which positions are to be covered is within the prerogative of the legislature." E. REUTTER & R. HAMILTON, THE LAW OF PUBLIC EDUCATION 448 (1970).

[11] *See generally* NATIONAL EDUCATION ASS'N OF THE UNITED STATES, *supra* note 9.

[12] *See, e.g.*, ALASKA STAT. § 14.20.150 (1970); IDAHO CODE ANN. § 33-1212 (1963); IND. ANN. STAT. § 28-4307 (1948); KAN. STAT. ANN. §§ 72-5403,-5406,-5410 (Supp. 1965); OHIO REV. CODE ANN. §§ 3319.08-.081 (Page Supp. 1970).

[13] *See, e.g.*, Horosko v. School Dist., 335 Pa. 369, 6 A.2d 866, *cert. denied*, 308 U.S. 553 (1939).

[14] *See, e.g.*, Jarvella v. Willoughby-Eastlake City School Dist., 12 Ohio Misc. 288, 233 N.E.2d 143 (Lake County C.P. 1967).

[15] *See, e.g.*, Johnson v. United School Dist., 201 Pa. Super. 375, 191 A.2d 897 (1963).

[16] *See, e.g.*, Appeal of School Dist., 347 Pa. 418, 32 A.2d 565, *cert. denied*, 320 U.S. 782 (1943).

[17] *See, e.g.*, Hamberlin v. Tangipahoa Parish School Bd., 210 La. 483, 27 So. 2d 307 (1946).

[18] *See, e.g.*, LA. REV. STAT. ANN. § 17:443 (West 1963).

[19] *See, e.g.*, State *ex rel.* Charbonnet v. Jefferson Parish School Bd., 188 So. 2d 143 (La. Ct. App.), *cert. denied*, 249 La. 727, 190 So. 2d 238 (1966).

of education.[20] Where the teacher requests a hearing, he should have a right to legal counsel,[21] to present[22] and subpoena evidence and witnesses,[23] and to confront and cross-examine opposing witnesses.[24] The board has the burden of proof in establishing the cause for the teacher's discharge.[25] A full stenographic record should be made and a written decision — which may include findings of fact and conclusions of law — should be provided.[26] Tenure statutes have been construed liberally to effect the general purpose of the legislation: that is, the courts have given major emphasis to promoting the fundamental public policy of obtaining better education for the children of the state.[27]

Although the teacher is generally required to exhaust his administrative remedies,[28] the aforementioned statutory requirements afford him a means by which he may seek review in the state courts. Such judicial review is founded upon complete development and a full record of the facts presented at the hearing. The remedies most commonly sought are reinstatement and damages for breach of contract.[29] The most common issue presented is misapplication of the "good cause" standard. If the school administration was not remiss in following prescribed statutory procedures, the reviewing court

[20] *See Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1086 (1968).

[21] *See id.*

[22] *See, e.g.*, Rehberg v. Board of Educ., 345 Mich. 731, 77 N.W.2d 131 (1956).

[23] *See Developments in the Law — Academic Freedom, supra* note 20, at 1086.

[24] Additional evidence is not to be presented at an executive session following the adjournment of the hearing. Moffett v. Calcasieu Parish School Bd., 179 So. 2d 537 (La. Ct. App. 1965).

[25] *See, e.g.*, CAL. EDUC. CODE § 13412 (West 1969), which requires that upon a teacher's demand for a hearing, the school board must either rescind its action or file a complaint in a superior court setting forth the charges against the employee and allowing the court to determine if the charges are true and if they constitute sufficient grounds for dismissal.

[26] *See, e.g.*, Morey v. School Bd., 268 Minn. 110, 128 N.W.2d 302 (1964), *rehearing denied*, 271 Minn. 445, 136 N.W.2d 105 (1965); *cf.* Agner v. Smith, 167 So. 2d 86 (Fla. Dist. Ct. App. 1964), *appeal dismissed mem.*, 172 So. 2d 598 (Fla. 1965).

[27] *E.g.*, Swick v. School Dist., 141 Pa. Super. 246, 251, 14 A.2d 898, 900 (1940). *But see* Anderson v. Board of Educ., 390 Ill. 412, 61 N.E.2d 562 (1945), and Eveland v. Board of Educ., 340 Ill. App. 308, 92 N.E.2d 182 (1950) (tenure statutes construed strictly in favor of boards of education on the grounds that such statutes create a new liability on the part of boards, and that the statutes are in derogation of certain common law rights of the school boards); Andrews v. Union Parish School Bd., 191 La. 90, 184 So. 552 (1938) (tenure statute construed liberally in favor of teachers as the primary beneficiaries of such legislation).

[28] *See, e.g.*, Moore v. Starkey, 185 Kan. 26, 340 P.2d 905 (1959).

[29] In addition, school boards and individual members may be held personally liable under the tenure laws when they wrongfully exercise ministerial functions. Babb v. Moore, 374 S.W.2d 516 (Ky. Ct. App. 1964).

will uphold the administrative decision as long as it was based on "substantial evidence"[30] or was not "arbitrary and capricious,"[31]

Tenure statutes generally afford little if any protection to the nontenured teacher. Since the authority to grant tenure falls within the broad discretion of the school board, a refusal to grant tenure is ordinarily not reviewable by the courts.[32] In addition, the nontenured teacher generally has no right to notice of cause or a hearing for renewal, unless, as in some states, they are specifically provided for by statute.[33]

B. *Contractual Tenure*

Contractual tenure becomes most important in private and higher education since these areas are generally devoid of statutory protection.[34] The private institutions and public universities, therefore,

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[30] *See* Last v. Board of Educ., 37 Ill. App. 2d 159, 185 N.E.2d 282 (1962); Hauswald v. Board of Educ., 20 Ill. App. 2d 49, 155 N.E.2d 319 (1958); Swisher v. Darden, 59 N.M. 511, 287 P.2d 73 (1955).

[31] *See* Board of Educ. v. Allen, 6 N.Y.2d 127, 160 N.E.2d 60, 188 N.Y.S.2d 515 (1959). A trial de novo before the court is normally not permitted. Parker v. Board of Trustees, 242 Cal. App. 2d 614, 51 Cal. Rptr. 653 (Dist. Ct. App. 1966).

[32] *Cf.* Application of Lombardo, 18 App. Div. 2d 444, 240 N.Y.S.2d 119, *aff'd mem.*, 13 N.Y.2d 1097, 196 N.E.2d 266, 246 N.Y.S.2d 631 (1963). *But see* Albaum v. Carey, 283 F. Supp. 3 (E.D.N.Y. 1968), where a high school teacher alleged that he was denied tenure status for his union activities and that the state tenure laws gave unconstitutionally broad discretion to school administrators. The district court recognized that "[t]enure decisions present delicate and difficult questions in any educational system." *Id.* at 11. The court further stated that "[i]t may be that precise standards cannot be formulated for determining who shall be appointed to tenure. . . . [But as] one commentator has put it . . . 'the impossibility of defining with precision the scope of the employer's appropriate control over the employee is insufficient reason for treating that control as boundless.'" *Id.* at 12, *quoting* Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1407 (1967). In addition, an attempted denial of tenure is ineffective where it is coupled with the hiring of the previously probationary teacher for 1 more year. *See, e.g.*, La Shells v. Hench, 98 Cal. App. 6, 276 P. 377 (Dist. Ct. App. 1929). And a teacher may be found to have gained tenure by estoppel. Eulalie M. Sanders, 72 N.Y. Dep't R. 39 (Educ. Dep't 1951).

A few tenure statutes do, however, set forth minimal requirements for the dismissal of nontenured personnel. If nonretention after the probationary period does not comply with these requirements, the court may order the administration to grant professional tenure to the discharged employee. *See* Elias v. Board of School Directors, 421 Pa. 260, 218 A.2d 738 (1966), where the court ordered that permanent professional status be granted to two school nurses who were certified and had served the appropriate probationary period. The tenure statute provided that temporary professional employees had to be rated twice a year and could not be dismissed unless rated "unsatisfactory." Neither of the nurses had ever been so rated. *See also* Mannix v. Board of Educ., 21 N.Y.2d 455, 235 N.E.2d 892, 288 N.Y.S.2d 881 (1968).

[33] *See, e.g.*, ALASKA STAT. § 14.20.140 (1970); ARK. STAT. ANN. § 80-1304(b) (Supp. 1969); CONN. GEN. STAT. ANN. § 10-151 (Supp. 1971); N.M. STAT. ANN. § 77-8-9 (1953); R.I. GEN. LAWS ANN. § 16-13-2 (Supp. 1970).

[34] "The prime need is not for extramural intervention, but for each institution of

will often embody in their by-laws or regulations rights similar to those found in the tenure statutes. These rights are in turn incorporated by reference into the teacher's contract of employment.[35] Should the administration not honor the provisions, the contractually tenured teacher often has the leverage of influential, teacher pressure groups which may adopt sanctions against the university for noncompliance.[36] Along with the usual remedies available for breach of contract, there is authority for reinstatement via a prerogative writ.[37]

C. *Absence of Tenure*

Where there is no tenure system[38] or where the system lacks either substantive or procedural safeguards, the teacher is relegated to the state law respecting employment contracts. Assuming that the employment contract does not contain provisions analogous to the tenure statutes, the teacher has no right to renewal at the end of the contract period.[39] Under such circumstances, the employer, in the person of the board of education or the board of trustees, has vast discretion as to the teacher's contract renewal. The board also has the ability to discharge the teacher during the term of the contract. Al-

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higher learning to engage in systematic discussion and analysis and to take appropriate action to make tenure as positive a force as possible for the good of education." Byse & Joughin, *Tenure in American Higher Education: "Specific Conclusions and Recommendations"*, in ACADEMIC FREEDOM AND TENURE 210 (L. Joughin ed. 1969).

[35] *See* State *ex rel.* Keeney v. Ayers, 108 Mont. 547, 92 P.2d 306 (1939).

[36] For an analysis of the various contemporary pressures supporting academic freedom, see S. HOOK, ACADEMIC FREEDOM AND ACADEMIC ANARCHY (1969); DeBardeleben, *The University's External Constituency*, in DIMENSIONS OF ACADEMIC FREEDOM 69 (1969). *See also* AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM, ACADEMIC DUE PROCESS (1966); Joughin, *Academic Due Process*, in ACADEMIC FREEDOM AND TENURE 264 (L. Joughin ed. 1969).

[37] *See* State *ex rel.* Keeney v. Ayers, 108 Mont. 547, 92 P.2d 306 (1939) (mandamus action against state university officials); State *ex rel.* Richardson v. Board of Regents, 70 Nev. 144, 261 P.2d 515 (1953) (writ of certiorari issued to review actions of state university officials on theory that their action was quasi-judicial in nature). *But see* Davis, *Enforcing Academic Tenure: Reflections and Suggestions*, 1961 WIS. L. REV. 200, 216-18.

Where tenure regulations are promulgated by a university or a board of regents, a number of courts have refused to bind the board to contractual tenure because of the derogation of the board's statutory power to dismiss arbitrarily and without cause. *See* Posin v. State Bd. of Higher Educ., 86 N.W.2d 31 (N.D. 1957); Worzella v. Board of Regents of Educ., 77 S.D. 447, 93 N.W.2d 411 (1958); State *ex rel.* Hunsicker v. Board of Regents, 209 Wis. 83, 244 N.W. 618 (1932).

[38] Although a majority of the states have tenure statutes, a significant number do not. *See* NATIONAL EDUCATION ASS'N OF THE UNITED STATES, *supra* note 9.

[39] *Cf.* Parker v. Board of Educ., 237 F. Supp. 222 (D. Md.), *aff'd per curiam*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966) (arbitrary nonrenewal of probationary teacher's contract was upheld).

though such a dismissal may entitle the teacher to damages for breach of contract, the employer will escape liability upon a showing of cause.[40] Moreover — assuming that the common law doctrine of sovereign immunity is not already a bar to the suit under the particular state's law[41] — such a damage action by the aggrieved teacher is often unsatisfactory. If he prevails, he no longer has a position;[42] if he seeks and procures another position, the principle of mitigation of damages will substantially reduce the amount of his recovery.[43] Should the teacher choose injunctive relief instead, he will find that such a remedy is not generally available for breach of an employment contract.[44] The prerogative writ, where the employer is a public institution, would also fail since the continued employment of the nontenured teacher is generally not a mandatory duty of a public official.[45]

In summary, where tenure systems exist, the protections afforded by statute or contract allow for the exercise of academic freedom by those who have been granted tenure. The teacher who has not been granted statutory or contractual tenure, as well as the teacher where

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[40] *See* Millar v. Joint School Dist., 2 Wis. 2d 303, 312, 86 N.W.2d 455, 460 (1957) (dictum).

[41] The threshold problem in a suit brought under state substantive law is that in many states the doctrine of sovereign immunity disallows suits brought against the state, except in such courts and in such manner as may be provided by statute. And suits against state institutions and officials where the state is the real party in interest are of course considered suits against the state. *See, e.g.*, State *ex rel.* Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82, *cert. denied*, 332 U.S. 817 (1947).

At least 9 states have consented by statute to suit on their contracts: ILL. ANN. STAT. ch. 37, § 439.8(B) (Smith-Hurd Supp. 1971); MASS. ANN. LAWS ch. 258, § 1 (1956); MICH. STAT. ANN. § 27A.6419 (1962); MONT. REV. CODE ANN. § 83.601 (1966); NEB. REV. STAT. § 24-324 (1964); N.H. REV. STAT. ANN. § 491.8 (1955); N.Y. CT. CL. ACT § 9 (1963); N.D. CENT. CODE § 32-12-03 (1960); WASH. REV. CODE ANN. § 4.92.010 (Supp. 1970).

Such statutes, however, are narrowly construed. For example, in Wolf v. Ohio State Univ. Hosp., 170 Ohio St. 49, 162 N.E.2d 475 (1959), a tort action against a state-supported hospital, the court refused to find that the state had consented to suit, even though OHIO REV. CODE ANN. § 3335.03 (Page 1953) provided that the Board of Trustees of the Ohio State University could "sue and be sued." The court reasoned that since this section did not designate in what courts and in what manner suit could be brought against the Board, it was not the intention of the legislature to consent to suits against the Board.

[42] *Cf.* Independent Dist. v. Deibert, 60 S.D. 424, 244 N.W. 656 (1932).

[43] *See, e.g.*, Miller v. South Bend Special School Dist., 124 N.W.2d 475 (N.D. 1963); Coble v. School Dist., 178 Pa. Super. 301, 116 A.2d 113 (1955).

[44] *See, e.g.*, Greene v. Howard Univ., 271 F. Supp. 609, 615 (D.D.C. 1967), *rev'd and remanded on other grounds*, 412 F.2d 1128 (D.C. Cir. 1969); Felch v. Findlay College, 119 Ohio App. 357, 200 N.E.2d 353 (Hancock County Ct. App. 1963).

[45] *See, e.g.*, Posin v. State Bd. of Higher Educ., 86 N.W.2d 31 (N.D. 1957); State *ex rel.* Hunsicker v. Board of Regents, 209 Wis. 83, 244 N.W. 618 (1932).

there is no tenure system or where that system is inadequate, must rely on the limited protection afforded by a particular state's law respecting employment contracts. With such limited protection, these nontenured teachers are able to exercise academic freedom only at the risk of nonrenewal of their contracts or dismissal for unprescribed cause. In view of these risks accompanying the nontenured teacher's exercise of academic freedom, the concept of constitutional tenure becomes relevant. Constitutional tenure, however, is not significant for the nontenured teacher alone; it may be equally significant for the tenured teacher whose dismissal for cause hinges upon constitutional freedoms. Thus, although the following discussion will be directed primarily toward the constitutional protections afforded the nontenured teacher, it must be kept in mind that the applicability of constitutional tenure is not so limited.

III. THE TREND

As James Madison once stated: "If men were angels, no government would be necessary."[46] It may be added that if those who govern were even demiangels no due process requirements would be necessary. It has long been recognized, however, that arbitrariness, even deliberate arbitrariness, "is not unknown in the most elite intellectual circles,"[47] and university administrators are not necessarily among those best known as paragons of fair play. Nevertheless, until recently, in court actions brought by teachers confronted with dismissal or nonretention, the alleged arbitrary and capricious acts of the administration were generally vindicated. The courts, honoring the doctrine of judicial restraint, gave great deference to the administrator's expertise in evaluating the myriad of variables and interpersonal relationships necessary to maintain the academic homeostasis within the educational institution. But the increasingly evident impersonal bureaucracy and errant decisions of educational administrators has led the courts to more readily enter the academic environs. Whereas previously the protections afforded by the due process clause of the 14th amendment were not deemed applicable to teachers against whom the school administration had applied arbitrary sanctions,[48] today, such teachers are beginning to receive substantial

[46] THE FEDERALIST NO. 51, at 337 (Nat'l Home Library Found. ed. 1938) (A. Hamilton, J. Jay & J. Madison).

[47] Byse, *The University and Due Process: A Somewhat Different View*, 54 A.A.U.P. BULL. 143 (1968).

[48] *See, e.g.*, Scopes v. State, 154 Tenn. 105, 111-12, 289 S.W. 363, 364-65 (1927) (the "monkey trial"), where the court stated:

constitutional protection. No longer need the teacher rely solely upon the conceptualisms that inhere in the state's contract or tenure laws. The hypostasis of the past that public employment is a privilege to which the state may attach conditions restricting the employee's positive constitutional freedoms — subject only to the ill-defined limitations that the conditions be reasonable[49] — has been explicitly discredited by the Supreme Court.[50] In doing so, the Court presaged a trend in the lower courts which have recognized a general due process right against arbitrary, capricious, and unreasonable action by tax-supported institutions against their teachers.[51]

To the university administrator, the spectre of federal court decisions challenging areas that were once considered the educational world's peculiar province may well be viewed with alarm. The administrator has probably just revamped, at a considerable expense in time and money, the student disciplinary system to accommodate burgeoning procedural and substantive due process requirements. Is he now faced with a similar burden respecting his faculty employment policies? Is this previously sacrosanct area of "academic process" also being overlaid with an insensitive gloss of "judicial process" which has such a degree of complexity that it leaves the administrator constantly vulnerable to the summons server? Has the clear legislative intent of the tenure statutes been controverted by a nontenured faculty member's absolute right to employment at a public institution — this right supposedly being derived from the United States Constitution? Although the answer to these questions is a qualified no, the administrator might well anticipate changes in policy which will necessarily accompany the new constitutional protections afforded the nontenured teacher. "The Fourteenth Amendment, as now applied to the States, protects the citizen against the

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> The plaintiff in error was a teacher in the public schools of Rhea county. He was an employee of the state of Tennessee or of a municipal agency of the state. He was under contract with the state to work in an institution of the state. He had no right or privilege to serve the state except upon such terms as the state prescribed. . . .
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> The statute before us . . . . is an act of the state as a corporation, a proprietor, an employer. It is a declaration of a master as to the character of work the master's servant shall, or rather shall not, perform. In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of . . . the Tennessee Constitution, nor of the Fourteenth Amendment to the Constitution of the United States.

[49] *See, e.g.*, Adler v. Board of Educ., 342 U.S. 485, 492 (1952).

[50] Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967). *See also* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

[51] *See, e.g.*, Roth v. Board of Regents of State Colleges, 310 F. Supp. 972 (W.D. Wis. 1970); Gouge v. Joint School Dist., 310 F. Supp. 984 (W.D. Wis. 1970).

State itself and all of its creatures — Boards of Education [and Boards of Trustees] not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."[52] To this end, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[53] Although the courts have often stated the principle that teachers deserve special protection because of society's interest in the preservation of academic freedom,[54] the protection that is promised them under the doctrine of "unconstitutional conditions"[55] — and promised, as a general matter, to all public employees[56] — is just beginning to be realized.

IV. The Concept of Constitutional Tenure

A. *Threshold Problems*

Before the substantive and procedural due process contours of constitutional tenure are considered, it is necessary to discuss the questions of jurisdiction and sovereign immunity as they pertain to constitutional tenure.

1. *Jurisdiction.*— A teacher alleging a deprivation of his constitutional rights can assert a federal cause of action under section 1983 of the Civil Rights Act of 1871.[57] Federal district courts have

[52] West Virginia State Bd. of Educ. v. Barnett, 319 U.S. 624, 637 (1943).

[53] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).

[54] "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960). *See also* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[55] "Generally the doctrine states that while a government, state or federal, may not be obligated to provide its citizens with a certain benefit or privilege, it may not grant the benefit or privilege on conditions requiring the recipient in some manner to relinquish his constitutional rights." Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968). *See also* Note, *supra* note 50.

[56] *See* Comment, *supra* note 55.

[57] 42 U.S.C. § 1983 (1964). The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A somewhat similar federal remedy exists under section 1985(3) of the Civil Rights Act of 1871, 42 U.S.C. § 1985(3) (1964), which provides a federal cause of action for the deprivation of equal protection of the law or equal privileges and immunities under the law. Actions under section 1985(3), however, are restricted to instances where the

original jurisdiction to hear such a complaint,[58] and because the remedy available under section 1983 has been declared supplementary to any state remedies, the complainant need not seek redress in the state courts before the federal remedy may be invoked.[59] To sustain an action under section 1983,[60] the complainant must clearly show (1) that the defendant's (university's) conduct deprived the complainant of rights, privileges, or immunities secured by the United States Constitution and laws,[61] and (2) that the conduct complained of was engaged in under color of state law.[62]

In view of the latter requirement as it is construed under the doctrine of state action, section 1983 becomes especially significant to the nontenured teacher in the state-supported institution. As early as 1947 the Court of Appeals for the Second Circuit stated that the dismissal of a nontenured teacher from a state-supported institution under a statute providing for dismissal of a probationary teacher for any reason or no reason was " 'under color' of a state statute," and, therefore, the court had jurisdiction.[63] It is not always necessary that such a state statute exist; indeed, state action is generally found whenever the conduct of a state agency infringes upon a person's rights.[64] Whether jurisdiction is granted to a teacher in a state-supported university will thus depend, for the most part, upon the finding of a constitutionally protected interest.[65]

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defendant's conduct infringes upon the rights of several persons or a class of persons. *See* Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) (a white doctor discharged without a hearing as a result of allegations that he was biased against Negroes stated a valid claim under section 1983 and not under section 1985(3)).

[58] 28 U.S.C. § 1343(3) (1964) (granting original jurisdiction to federal district courts to hear, among others, actions asserting a deprivation of constitutional rights, privileges, or immunities under color of state law).

[59] Monroe v. Pape, 365 U.S. 167, 183 (1961); Lucia v. Duggan, 303 F. Supp. 112, 117 (D. Mass. 1969).

[60] *Cf.* Rutherford v. American Medical Ass'n, 379 F.2d 641 (7th Cir. 1967), *cert. denied*, 389 U.S. 1043 (1968); Colon v. Grieco, 226 F. Supp. 414 (D.N.J. 1964).

[61] *Cf.* Flemming v. Adams, 377 F.2d 975 (10th Cir.), *cert. denied*, 389 U.S. 898 (1967); Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

[62] *See* Powe v. Miles, 407 F.2d 73, 79-80 (2d Cir. 1968).

[63] Bomar v. Keyes, 162 F.2d 136, 139 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947).

[64] The Supreme Court has pointed out that in a section 1983 action, "under color of law" refers to an action taken by an agent of the state whose power is derived from state law and that the action itself need not be "pursuant" to a state statute or regulation. Monroe v. Pape, 365 U.S. 167, 187 (1961). *See also*, United States v. Classic, 313 U.S. 299, 326 (1941).

[65] *See* Freeman v. Gould Special School Dist., 405 F.2d 1153, 1159 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969); Roth v. Board of Regents of State Colleges, 310 F. Supp. 972, 974 (W.D. Wis. 1970); Gouge v. Joint School Dist., 310 F. Supp. 984, 988-89 (W.D. Wis. 1970); Parker v. Board of Educ., 237 F. Supp. 222, 226 (D. Md.), *aff'd*

The state action doctrine, as presently developed, does not extend so far as to bring private institutions under color of state law in all of their activities. However, institutions which are otherwise "private" have been found involved in sufficient state action to subject themselves to suits under the 14th amendment, where there exists any one or a combination of the following: (1) state control — either financial, constitutional, legislative, judicial, or administrative;[66] (2) a public function;[67] or (3) state contacts.[68] Where the doctrine has been extended to the private school, however, it has generally been limited to those institutions with a policy of racial discrimination.[69] "The courts have seemingly been reluctant to extend the doctrine to eliminate other kinds of activities that would be deemed unconstitutional if performed solely by the state."[70] Thus, until the state action doctrine has been sufficiently developed to subject private institutions, in all instances, to the due process clause, the cases involving the state-supported institutions cannot be deemed determinative of the substantive and procedural standards required of private schools.

2. *Sovereign Immunity.*— The established rule of immunity of the states from suit in the federal courts does not preclude an equity action to enjoin the acts of state officers or state agencies which allegedly deprive a person of rights granted under the Constitution

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per curiam, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966).

Contra, Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970). This court dismissed the action of a discharged teacher despite the allegation that the discharge was in violation of his first amendment rights. The court, focusing on Colorado statutes giving the board of trustees complete discretion in its employment practices, concluded that Jones had not been denied his constitutional rights because the board was under no duty to reemploy him.

[66] The Supreme Court has noted that the 14th amendment "governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.'" Mooney v. Holohan, 294 U.S. 103, 113 (1935) (per curiam), *quoting* Carter v. Texas, 177 U.S. 442, 447 (1900).

[67] *See* Marsh v. Alabama, 326 U.S. 501 (1946). *See also* Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967).

[68] *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[69] *See* Comment, *Student Due Process in the Private University: The State Action Doctrine*, 20 SYRACUSE L. REV. 911, 914-19 (1969); Comment, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLAMETTE L.J. 277 (1969). *Contra*, Van Alstyne, *The Judicial Trend Toward Academic Freedom*, 20 FLA. L. REV. 290 (1968). "[T]he presence of government has so far penetrated, that few colleges are today wholly 'private' in the sense of being altogether immune to the fourteenth amendment and the Bill of Rights." *Id.* at 291.

[70] Comment, *Student Due Process in the Private University: The State Action Doctrine*, 20 SYRACUSE L. REV. 911, 919 (1969). *See* Powe v. Miles, 407 F.2d 73, 79-80 (2d Cir. 1968); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968).

of the United States. In the recent case of *Roth v. Board of Regents of State Colleges*,[71] a nontenured professor whose employment contract had not been renewed brought an action under section 1983 of the Civil Rights Act of 1871[72] for declaratory and injunctive relief. Defendants raised as one of their defenses the doctrine of sovereign immunity. The court, rejecting the defendants' argument, made it clear that when a state agency or board violates federally protected constitutional rights, "[n]either the Eleventh Amendment nor the doctrine of Hans v. Louisiana, [134 U.S. 1 (1890)], affords these defendants the shield of sovereign immunity . . . ."[73] Because the proceeding is regarded as one against individuals whose action — by virtue of the Constitution — is unlawful, state agents may not claim for themselves the benefit of the state's immunity from suit.[74]

B. *Substantive Due Process*

The Supreme Court has held that the personal and professional rights of teachers, as protected under the due process clause of the 14th amendment, cannot be disregarded by the states in the operation of their educational institutions: "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[75] Due process of law therefore requires that the interests of the state and its educational institutions be balanced against the interests of the teachers therein. The concept of "constitutional tenure" is primarily based upon the teachers' substantive rights and protections, as set forth below, that have recently emerged from the balancing of these interests.

1. *The employment of a teacher in a public school cannot be terminated because he has exercised a freedom secured to him by the Constitution of the United States.* This proposition, as related to

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[71] 310 F. Supp. 972 (W.D. Wis. 1970).

[72] 42 U.S.C. § 1983.

[73] 310 F. Supp. at 974. *See Ex parte* Young, 209 U.S. 123, 149-59 (1908); Orleans Parish School Bd. v. Bush, 242 F.2d 156, 160-51 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957).

[74] Louisiana State Bd. of Educ. v. Baker, 339 F.2d 911 (5th Cir. 1964); *accord*, School Bd. v. Allen, 240 F.2d 59, 63 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957): "A state can act only through agents; and whether the agent be an individual officer or corporate agency, it ceases to represent the state when it attempts to use state power in violation of the Constitution and may be enjoined from such unconstitutional action."

[75] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

the broader problem of whether public employment in general can be conditioned upon waiver of a constitutional right, is of relatively recent vintage. In the past, there was little doubt that public employment could be so conditioned. The oft-quoted dictum of Justice Holmes, in the seminal case of *McAuliffe v. City of New Bedford*,[76] that one "has no constitutional right to be a policeman"[77] was clearly taken to uphold the arbitrary denial of government employment.[78] The Supreme Court twice held that public employment could be conditioned upon a waiver of constitutional rights. In *United Public Workers v. Mitchell*,[79] the Court said: "Congress may regulate the political conduct of government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered polititcal action."[80] And in *Adler v. Board of Education*,[81] the Court said:

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[76] 155 Mass. 216, 29 N.E. 517 (1892).

[77] *Id.* at 220, 29 N.E. at 517. In a more complete form, the passage from which the quoted statement was taken reads as follows:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. *Id.* at 220, 29 N.E. at 517-18.

[78] Such were the judicial attitudes toward public employees in the late 19th and early 20th centuries. *See* Devol v. Board of Regents, 6 Ariz. 259, 56 P. 737 (1899); Hartigan v. Board of Regents, 49 W. Va. 14, 38 S.E. 698 (1901). *See also* Murphy, *Academic Freedom — An Emerging Constitutional Right*, 28 LAW AND CONTEMP. PROB. 447, 457 (1963).

However, if one looks at the sentence that follows the passage quoted in note 77, *supra*, it is clear that Justice Holmes was prescribing a test of "reasonableness," not capriciousness. Justice Holmes added: "On the same principle the city may impose any reasonable condition upon holding offices within its control." McAuliffe v. City of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892).

[79] 330 U.S. 75 (1947). In *Mitchell* the Court upheld government interference in activities within the scope of the first amendment under two sections of the Hatch Act [5 U.S.C. §§ 7324-25 (1964)] which impose restrictions on federal employees engaging in political activity.

[80] 330 U.S. at 102.

[81] 342 U.S. 485 (1962). The *Adler* Court upheld as constitutional section 3022 of the New York Education Law, N.Y. EDUC. LAW § 3022 (McKinney 1949), *as amended*, N.Y. EDUC. LAW § 3022 (McKinney 1970), which provides for the disqualification and removal from the public school system of teachers who advocate the overthrow of the government by unlawful means or who belong to organizations that have such a purpose. Mr. Justice Minton, writing for the majority, stated:

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. 342 U.S. at 493.

The Supreme Court subsequently found section 3022 to be unconstitutionally over-

> It is clear that [New York public school employees] have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State in the school system on their own terms. . . . [T]hey are at liberty to retain their beliefs and associations and go elsewhere.[82]

But the forwarning of a change in attitude was apparent from the dissenting opinions in both of these cases. Mr. Justice Black, dissenting in *Mitchell*, stated:

> There is nothing about federal and state employees as a class which justifies depriving them or society of the benefits of their participation in public affairs. . . . I think the Constitution guarantees to them the same rights that other groups of good citizens have to engage in activities which decide who their elected representatives shall be.[83]

And Mr. Justice Douglas, dissenting in *Adler*, vigorously attacked the proposition that public employees may be relegated to the position of "second-class citizens."[84] He asserted that a person entering public service does not and cannot be forced to sacrifice his civil rights. "The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher."[85]

The line of cases that followed the *Adler* and *Mitchell* decisions eroded the privilege doctrine to the point that the position espoused therein could be more accurately restated as follows: Although one has no constitutional right to public employment, one does have a constitutional interest in not being denied admittance to, or continuation in, a position of public employment for arbitrary and capricious reasons, or for reasons that conflict with fundamental constitutional rights.[86] The first Supreme Court decision to take this approach was the 1952 case of *Wieman v. Updegraff*.[87] The Court, faced with an arbitrary refusal by state officials to pay the salaries of teachers and other public employees who refused to subscribe to a loyalty oath, stated that to assert the "facile generaliza-

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broad to the extent that it makes mere membership in the Communist party prima facie evidence of disqualification for employment. Keyishian v. Board of Regents, 385 U.S. 589, 591, 609-610 (1967).

[82] 342 U.S. at 492 (citations omitted).

[83] 330 U.S. at 111-12.

[84] 342 U.S. at 508.

[85] *Id.*

[86] *See* Note, *The First Amendment and Public Employees — An Emerging Constitutional Right to be a Policeman?*, 37 GEO. WASH. L. REV. 409 (1968). *See also* Comment, *supra* note 55; Note, *supra* note 50.

[87] 344 U.S. 183 (1952).

tion that there is no constitutionally protected right to public employment is to obscure the issue."[88] There "need [be no] pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory."[89] Mr. Justice Black, concurring, further stated: "We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven. . . . [T]he right to speak on matters of public concern must be wholly free or eventually be wholly lost."[90]

By 1967, in *Keyishian v. Board of Regents*,[91] the dissenting opinion in *Adler* had become escalated to the majority opinion of the Court. The *Keyishian* Court — clearly rejecting the premise that "public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action"[92] — held unconstitutional a complex statutory and regulatory scheme which was to "prevent the appointment or retention of 'subversive' persons in state employment."[93] In reaching this decision the Court stated: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[94]

In 1968, the Court, in *Pickering v. Board of Education*,[95] again addressed itself to first amendment rights. After a letter critical of the school administration was sent to a local newspaper by a tenured teacher, the school board dismissed the teacher on a determination that "the publication of the letter was 'detrimental to the ef-

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88 *Id.* at 191.

89 *Id.* at 192; *accord*, Slochower v. Board of Higher Educ., 350 U.S. 551 (1956), where the Court, striking down a statute that required a teacher's dismissal for exercising his fifth amendment privilege against self-incrimination, stated: "To state that a person does not have a constitutional right to government employment is only to say that he must comply with the reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities." *Id.* at 555.

90 344 U.S. at 193.

91 385 U.S. 589 (1967).

92 *Id.* at 605. For a statement of the doctrine of unconstitutional conditions, see note 55 *supra*. *See also* O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966).

93 385 U.S. at 592.

94 *Id.* at 603.

95 391 U.S. 563 (1968).

ficient operation and administration of the schools of the district' . . . ."[96] The Court, dealing directly with the first amendment issue, stated:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.[97]

In *Wieman, Keyishian,* and *Pickering* the Court did not rely upon the privilege-right dichotomy. The Court did not assert that the due process clause provides a "right" to teach; rather, the inquiry went to whether there is a general obligation on the part of the government to act fairly with its employees. Utilizing the concept of a "constitutionally protected interest,"[98] the Court could avoid the necessity of finding a right to life, liberty, or property that was deprived without due process of law.[99] Once infringement of a constitutionally protected interest was at issue, due process could be used to test the validity of the limitations put on the teacher's substantive rights by questioning the reasonableness of their denial under the circumstances.

2. *A teacher's specific (positive) constitutional rights may be limited only upon a showing that his activity interferes with an overriding public interest.* Confronted with the allegation that a teacher's constitutional freedoms have been infringed, the court must proceed to weigh the interest of the individual teacher against the interests of the school system and determine what safeguards are constitutionally required. This balancing of interests required by due process "is not a mechanical instrument. It is not a yardstick. It is a process."[100] "Its exact boundaries are undefinable, and its content varies according to specific factual contexts."[101]

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[96] *Id.* at 564.

[97] *Id.* at 568.

[98] *See, e.g.,* Cafeteria Workers v. McElroy, 367 U.S. 886, 894-95, 900 (1961). *See also* Roth v. Board of Regent of State College, 310 F. Supp. 972 (W.D. Wis. 1970).

[99] *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). *See also* Roth v. Board of Regents of State Colleges, 310 F. Supp. 972, 976 (W.D. Wis. 1970).

[100] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

[101] Hannah v. Larche, 363 U.S. 420, 442 (1960).

In *Pickering v. Board of Education*,[102] the Court pointed out that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." The test is to "balance . . . the interests of the teacher, as a citizen . . . and the interest of the State, as an employer . . . ."[103] The standard used in this particular case was: Where the "employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher . . . it is necessary to regard the teacher as the member of the general public he seeks to be."[104] Recognizing that at times the interests of the state in efficient public service and the interests of a teacher in free speech may be in conflict, the Court found that, in this case, the teacher's statements were entitled to the same protections as if made by a member of the general public; therefore, his dismissal by the board was not justifiable.[105]

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[102] 391 U.S. 563 (1968).

[103] *Id.* at 568; *accord*, Cafeteria Workers v. McElroy, 367 U.S. 886, 896-98 (1961), where the Court utilized a similar balancing approach to deny relief to a "security risk" whose employment at a defense plant had been terminated.

[104] 391 U.S. at 574.

[105] The Court also conceded, however, that "[i]t is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal." *Id.* at 570 n.3.

Subsequent to its decision in *Pickering*, the Supreme Court set aside two state court decisions with instructions to reconsider the cases in the light of the principles announced in *Pickering*. In Puentes v. Board of Educ., 24 App. Div. 2d 628 (2d Dep't 1965), *aff'd mem.*, 18 N.Y.2d 906, 223 N.E.2d 45, 276 N.Y.S.2d 638 (1966), *vacated and remanded per curiam*, 392 U.S. 653 (1968), *rev'd mem.*, 24 N.Y.2d 996, 250 N.E.2d 232, 302 N.Y.S.2d 824 (1969), the president of the teachers' federation had been suspended without pay because he wrote a letter (containing some inaccuracies, as did the statements in *Pickering*) critical of the board's failure to renew the contract of a probationary teacher. The Supreme Court vacated the judgment and remanded for further consideration. Puentes v. Board of Educ., 392 U.S. 653 (1968). Upon remand [24 N.Y.2d 996, 250 N.E.2d 232, 302 N.Y.S.2d 824 (1969)] the court of appeals reversed its prior decision, finding that the inaccuracies in the letter were related to reports to which the teacher had no access and hence were not the result of reckless or intentional falsehood. The court said: "Indiscreet bombast in an argumentative letter, to the limited extent present here, is insufficient to sanction disciplinary action. Otherwise, those who criticize in an area where criticism is permissible would either be discouraged from exercising their right or would be required to do so in such innocuous terms as would make the criticism seem ineffective or obsequious." *Id.* at 998-99, 250 N.E.2d at 233, 302 N.Y.S.2d at 826. Since the contents of the letter were arguably within the free speech protection laid down in *Pickering*, the court ordered reinstatement of the teacher.

In an Alaska case, Watts v. Seward School Bd., 395 P.2d 372 (Alas. 1964), *remanded per curiam*, 381 U.S. 126 (1965), *aff'd*, 421 P.2d 586, *reh. denied*, 423 P.2d 678 (Alas. 1967), *vacated and remanded per curiam*, 391 U.S. 592 (1968), *aff'd*, 454 P.2d 732 (Alas. 1969), *cert. denied*, 397 U.S. 921 (1970), teachers were dismissed for distributing an open letter containing false statements disparaging the superintendent. Here too the Supreme Court vacated judgment and remanded for further consideration.

The *Pickering* doctrine was followed in *Los Angeles Teachers Union v. Los Angeles City Board of Education*.[106] Members of the Los Angeles Teachers Union wished to circulate, during duty-free periods, petitions directed to state officials seeking an increase in state support of public education. The school board refused to allow the circulation on the grounds that a controversial petition would cause unrest among the staff, and that the circulation would disturb teachers who were trying to work. The union sought a court order to compel the board to permit the petition to circulate. Quoting from *Pickering*, the Supreme Court of California said that it "must strike 'a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' "[107] In striking this balance the California court held that the government had no valid interest in restricting this speech-related activity simply in order to avert the sort of disturbance which is inevitably generated by the expression of ideas that are controversial. The court directed the school board to allow the teachers to circulate the petitions.

Balancing approaches similar to those in *Pickering* and *Los Angeles Teachers Union* have also been used by federal district courts. In *Friedman v. Union Free School District*,[108] an action was brought by the Bay Shore Classroom Teachers' Association challenging the right of the board of education to prohibit distribution in teachers' mailboxes of publications by the Association other than "routine internal distributions." The Association claimed that the distribution rule deprived teachers of their right to free speech in violation of the first and 14th amendments. The school board argued that as owner of the school premises it had the absolute right to direct how its facilities could be used, and that the distribution rule was necessary to keep the school premises free and clean of all litter. The court, citing prior holdings of the Supreme Court which had

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Watts v. Seward School Bd., 391 U.S. 592 (1968). The Supreme Court of Alaska, upon remand [454 P.2d 732 (Alas. 1969), *cert. denied*, 397 U.S. 921 (1970)], reaffirmed its prior decision, holding that the situation did not fall under the *Pickering* doctrine in that the statements and actions of the teachers were detrimental to the school district and caused disharmony among the staff. None of the statements concerned matters on which the public voted; rather, they were in the nature of grievances which should have been pursued through established school procedures. For these reasons the teachers' dismissals were held to be justified.

[106] 71 Cal. 2d 551, 455 P.2d 827, 78 Cal. Rptr. 723 (1969).

[107] *Id.* at 558, 455 P.2d at 831, 78 Cal. Rptr. at 727.

[108] 314 F. Supp. 223 (E.D.N.Y. 1970).

stated that such authority as claimed by the board must be exercised consistently with fundamental constitutional safeguards, found that the interests of the school board could hardly be deemed so substantial as to justify denial of first amendment rights. The court held the distribution rule to be "void on its face and in its application as an overbroad prohibition of the First Amendment rights . . . ."[109]

In *Roth v. Board of Regents of State Colleges*,[110] a district court ordered the school board to provide a nontenured teacher with a statement of the reasons for nonrenewal of his contract and a hearing at which those reasons could be challenged by the teacher. Relying on *Pickering*, the court noted: "A teacher's freedom of speech cannot be limited unless it can be shown that his utterances harm a substantial public interest."[111] Because the plaintiff was a nontenured university professor, the case also illustrates that courts have become highly sensitive to interferences with any teachers's specific constitutional rights, whether the teacher is tenured or not.[112]

3. *Tenured and nontenured teachers alike are protected against deprivation of their specific (positive) constitutional rights.* This view was taken as early as 1947 in *Bomar v. Keyes*.[113] There a probationary teacher was discharged under a New York statute because of her absence while exercising her privilege to serve on a federal jury. The law under which she was discharged allowed the discharge of a probationary teacher for any reason or for no reason at all.[114] An appeal to the commissioner of education was dismissed on the ground that the teacher "had not secured permanent tenure."[115] On appeal to the second circuit under section 1983 of the Civil Rights Act of 1871,[116] Judge Learned Hand stated that even if "her discharge by the Board was not a breach of contract . . . . it may have been the termination of an expectancy of continued employment, and that is an injury to an interest which the law will

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[109] *Id.* at 229.

[110] 310 F. Supp. 972 (W.D. Wis. 1970).

[111] *Id.* at 980-81.

[112] *See id.* at 976; Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); Bomar v. Keyes, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947); Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969).

[113] 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947).

[114] *Id.* at 139.

[115] *Id.* at 138.

[116] 42 U.S.C. § 1983 (1964).

protect against invasion by acts themselves unlawful, such as the denial of a federal privilege."[117]

In *Shelton v. Tucker*,[118] the Supreme Court held invalid a state statute that required teachers in state-supported schools and colleges to file an affidavit listing all of their organizational affiliations over the preceding 5 years. A class action was brought by a teacher whose contract was not renewed because he refused to file the required affidavit. Holding that the statute deprived teachers of their right to associational freedom as protected by the 14th amendment, the Court alluded to the absence of tenure protections in Arkansas:

> These provisions [of the state statute] must be considered against the existing system of teacher employment required by Arkansas law. Teachers there are hired on a year-to-year basis. They are not covered by a civil service system, and they have no job security beyond the end of each school year.[119]

Although the implication by the Court that the consititutional protection afforded a teacher is in some fashion determined by looking to the existence of state tenure laws seems specious, the Court's language, nevertheless, seems to carry with it the notion that the constitutional rights of a nontenured teacher require even closer protection by the courts than those of the tenured teacher since the nontenured teacher is subject to more employment pressures.

Similarly, in *Johnson v. Branch*,[120] a teacher's yearly contract was not renewed because of her involvement in civil rights activities. The state statute under consideration did not provide for tenure and provided that all contracts were for only 1 year, renewable at the discretion of the school authorities. The Court of Appeals for the Fourth Circuit, in directing the school board to renew the teacher's contract, stated that it is "beyond cavil that the state may not force the plaintiff to choose between exercising her legitimate constitutional rights and her right of equality of opportunity to hold public employment."[121]

In *McLaughlin v. Tilendis*[122] — an action brought by probation-

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117 162 F.2d at 139. Judge Hand pointed out that "[c]ertainly there are 'reasonable' limits to the exercise of her privilege; but the question whether she kept within such limits . . . must be tried . . . ." *Id.*

118 364 U.S. 479 (1960).

119 *Id.* at 482.

120 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

121 *Id.* at 180.

122 398 F.2d 287 (7th Cir. 1968). *See also* Pred. v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969), reversing the trial court's dismissal of a suit by teachers

ary teachers under section 1983 of the Civil Rights Act of 1871[123] — the Court of Appeals for the Seventh Circuit held that a teacher's right to join a union is protected by the first amendment. Thus, the school board could not dismiss or refuse to renew the contract of a nontenured teacher because of his exercise of that constitutional right.

In the recent case of *Jones v. Hopper*,[124] however, the Court of Appeals for the Tenth Circuit seemed to revert to a tenure-nontenure distinction, allowing conditions to be placed on a nontenured teacher that presumably would be unconstitutional if placed on a tenured teacher. Jones, a nontenured associate professor, sued the president and the board of trustees of the state college for damages arising from their refusal to renew a contract of employment for the coming academic year. The complaint alleged that Jones was denied a renewal of his contract for the sole reason that he sought to exercise his constitutional rights of speech, publication, and religion.[125] The district court dismissed the case for failure to state a claim upon which relief could be granted, and the Court of Appeals for the Tenth Circuit affirmed. The latter court held that in the absence of tenure or an existing contract of employment, the refusal to renew his contract does not deprive a teacher of any constitutional rights for purposes of section 1983 of the Civil Rights Act of 1871.[126] The court appeared to recognize extremely broad discretionary power in the university administration when it stated: "Because of the special needs of the university, both public and private, great discretion must be given it in decisions about the renewal of contracts during the probationary period. In deciding whether to rehire or grant tenure, the considerations involved go well beyond a judgment about general teaching competency."[127] Although the decision may be explained by the traditional caution of courts not to delve into the maze of symbiotic relationships that may exist among the various component constituencies of a university, the effect of such judicial

alleging that their contracts were not renewed because of their participation in a teachers' association and their advocacy of campus freedom.

123 42 U.S.C. § 1983 (1964).

124 410 F.2d 1323 (10th Cir. 1969) (per curiam), *cert. denied*, 397 U.S. 991 (1970).

125 The complaint specifically alleged that the nonrenewal decision was based on Jones' objection to the disqualification of an applicant for the English department because he was an Oriental, Jones' newspaper attack upon the English department's textbook, his founding of a student-faculty publication which criticized the Viet Nam war and commented on other controversal matters, and his support for a student who claimed conscientious objector status. *Id.* at 1326.

126 42 U.S.C. § 1983 (1964).

127 410 F.2d at 1329, *quoting Developments in the Law — Academic Freedom*, *supra* note 20, at 1101.

timidity is to jeopardize the position of any nontenured teacher. Such a judicial posture can only result in a first amendment chilling effect, thus inhibiting an otherwise free exchange of ideas.

The *Jones* decision, however, seems to represent the minority position; it is inconsistent with cases that preceded it, as reviewed above, and with subsequent state and federal decisions. In *Williams v. School District*,[128] a nontenured high school teacher alleged that she was not reemployed in a Missouri school system because of a speech that she had made before the Classical Association. The speech, which was subsequently published in the association's journal, included an evaluation of the comparative emphasis placed on athletics as opposed to scholarly pursuits in the public schools. The superintendent told the teacher that he found the speech offensive and that he would recommend that she not be reemployed. The trial court dismissed the entire complaint, and the teacher appealed. The Supreme Court of Missouri held that while the board does not have to reemploy a teacher, does not have to set out grounds for nonretention, and does not have to grant the teacher a hearing upon nonretention, "a school board's right not to rehire a teacher must not be on grounds that are violative of a teacher's constitutional right."[129] Accordingly, the court ordered the reinstatement of that part of the teacher's complaint that charged violation of a constitutional right and remanded the case for a trial on that issue.

The *Williams* court relied heavily upon the Supreme Court's decision in *Pickering v. Board of Education*,[130] which involved facts similar to those before the Missouri court. Although *Pickering* dealt with the dismissal of a tenured teacher, the broad language of the opinion suggests (as the *Williams* court apparently found) that the Court did not intend to limit the protection of first amendment rights to tenured teachers.

In *Roth v. Board of Regents of State Colleges*,[131] Judge Doyle stated that "substantive constitutional protection is unaffected by the presence or absence of tenure under state law."[132] Similarly, in *Gouge v. Joint School District*,[133] Judge Doyle said that the satisfaction of the requisites of state law is not determinative of "whether

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[128] 447 S.W.2d 256 (Mo. 1969).

[129] *Id.* at 265.

[130] 391 U.S. 563 (1968); *see* text accompanying notes 95-97, 102-05 *supra.*

[131] 310 F. Supp. 972 (W.D. Wis. 1970); *see* text accompanying notes 110-12 *supra.*

[132] 310 F. Supp. at 976; *see* cases cited in note 112 *supra.*

[133] 310 F. Supp. 984 (W.D. Wis. 1970).

the defendants met the minimum requirements of substantive . . . due process . . . in coming to the decision not to renew the plaintiffs' contracts."[134]

A federal district court in Indiana, in the case of *Roberts v. Lake Central School Corp.*,[135] found that the constitutional rights of a nontenured elementary school teacher had been abridged when a school system refused to rehire him because of a comment respecting the school board's bargaining tactics that he had made before a teachers' association. The principal of the school called the teacher in, charged that the statement was untrue, and demanded an apology; the teacher refused. When the teacher again refused to apologize before the superintendent, he was told that his nonretention would be recommended. The district court, finding that the comment did not threaten the efficient operation of the school, ordered the teacher reemployed. The court stated that if school boards were permitted not to renew teachers' contracts because of critical statements, "there would be a serious impairment in the freedom of teachers to speak out on issues concerning them."[136]

In light of the above discussion it becomes fairly clear that, whether a teacher is tenured or nontenured, most courts will not tolerate a termination or nonrenewal of a teacher's contract by a state agency when such action is spurred by the teacher's exercise of a specific constitutional right. However, what of the teacher who cannot allege infringement of a specific constitutional right, but only that the school administration's termination or nonrenewal of his contract was arbitrary and capricious? How may the Constitution protect him? If the teacher is tenured, the courts will generally find it unnecessary to reach basic constitutional issues; rather, they can ensure fairness by demanding strict adherence to the existing administrative safeguards, and, if necessary, interpreting the tenure requirements in such a way that rational treatment is most likely to be afforded an employee. Where the teacher in question is nontenured, however, courts have differed in their result. Some find a general due process right; some do not.

Mr. Justice Cardozo has characterized the protection of the individual from arbitrary action by the state as the very essence of due process.[137] The Supreme Court in *Wieman v. Updegraff*,[138] reaf-

134 *Id.* at 989.

135 317 F. Supp. 63 (N.D. Ind. 1970).

136 *Id.* at 65.

137 Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 302 (1937).

138 344 U.S. 183 (1952); *see* text accompanying notes 87-90 *supra.*

firmed that position with the statement: "[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[139] And recently, in *Norton v. Macy*,[140] where a civil service employee was dismissed as unfit because of his alleged homosexual activity, the Court of Appeals for the District of Columbia Circuit stated: "The Government's obligation to accord due process sets at least minimal substantive limits on its prerogative to dismiss its employees: it forbids all dismissals which are arbitrary and capricious."[141]

4. *A teacher, whether tenured or nontenured, should be protected by the due process clause of the 14th amendment against dismissal or nonretention which is arbitrary, capricious, or wholly without basis in fact.* In *Birnbaum v. Trussell*,[142] the Court of Appeals for the Second Circuit reasoned that "whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he [cannot] be removed . . . on arbitrary grounds . . . ."[143] Here, where a physician had been dismissed from a municipal hospital due to his alleged anti-Negro bias and without a hearing on the specific allegations, the court found two vital interests were threatened: reputation and the ability to pursue a profession effectively. The court stated: "Both are ordinarily accorded meticulous protection . . . to prevent direct injury by arbitrary state action."[144]

Because of the teaching profession's limited employment opportunities — the state being the main and often the sole employer — a teacher's discharge for an arbitrary or capricious reason would be no less damaging to his future career than a discharge for untested allegations of racial prejudice would be to a doctor's career. Thus, in *Lucia v. Duggan*,[145] where a nontenured teacher was summarily dis-

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[139] 344 U.S. at 192.

[140] 417 F.2d 1161 (D.C. Cir. 1969).

[141] *Id.* at 1164. In making its finding the court emphasized the fact that a "badge of infamy" may attach to alleged homosexuality.

It should be noted that the Court of Appeals for the District of Columbia Circuit has taken the most critical view of administrative terminations based upon conduct unrelated to employment, such as homosexuality. The Court of Appeals for the Fifth Circuit, on the other hand, has accepted the contention that private homosexual acts can be the basis for discharge. Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968), *cert. denied*, 393 U.S. 1041 (1969).

[142] 371 F.2d 672 (2d Cir. 1966).

[143] *Id.* at 678.

[144] *Id.* at 678-79 n.13.

[145] 303 F. Supp. 112 (D. Mass. 1969).

missed for wearing a beard, Judge Garrity, citing the *Birnbaum* decision, stated:

> Whatever the derivation and scope of [the nontenured teacher's] alleged freedom to wear a beard, it is at least an interest of his, especially in combination with his professional reputation as a school teacher, which may not be taken from him without due process of law. . . . Plaintiff's interest in wearing a beard and in his career as a teacher is not nullified by his having been employed less than the three years required to achieve tenure status.[146]

But in *Freeman v. Gould Special School District*,[147] the eighth circuit reached a different result. Six Negro teachers in Lincoln County, Arkansas asserted that the decision of the school board not to renew their contracts of employment was based on racial discrimination. Arkansas law did not provide for a tenure system; teachers were employed under annual contracts with automatic renewal unless written notice to the contrary was given within a prescribed time.[148] The court declared that in the absence of a tenure statute a local school board has the absolute right to decline to employ or reemploy any teacher as long as its decision is not violative of a specific constitutional right such as race, religion, freedom of association, or the right against self-incrimination.[149] The court found no evidence to support the teachers' allegation that the board's decision was racially discriminatory; rather, the decision appeared to be based on the recommendation of the local Negro principal, with whom the teachers had had several personal conflicts. Absent evidence of discrimination, the court held that no federal question was presented; the board's decision, even if it was arbitrary and capricious, violated none of the teachers' rights. Noting that "there are many public employees who are separated from their employment by a purely arbitrary decision," the court rejected the teachers' contention that "the Board must accord due process, both substantive and procedural, in all of its operative procedures."[150] The onus of an imminent flood of litigation must have lurked in the *Freeman* court's mind when it observed that under a contrary decision, "there could only be . . . a discharge for cause, with the school board carrying the burden of showing that the discharge was for a permissible rea-

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[146] *Id.* at 117-18.

[147] 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969).

[148] It should be noted that subsequent to the decision in *Freeman* a statewide teacher tenure law was adopted by the Arkansas legislature. *See* NATIONAL EDUCATION ASS'N OF THE UNITED STATES, *supra* note 9, at 33.

[149] 405 F.2d at 1159.

[150] *Id.* at 1160.

son."[151] The court felt that such a holding would render the tenure laws useless in the states which had adopted them.

The *Freeman* court had to distinguish the Supreme Court decision of *Slochower v. Board of Higher Education*.[152] The court did so by stating that the *Slochower* case "applied to a tenure situation and an unconstitutional city charter provision" which mandated the discharge of city employees who relied upon the fifth amendment.[153] The court also had to contend with *Schware v. Board of Bar Examiners*,[154] which held that a general due process right protecting a person against arbitrary, capricious, or unreasonable state action exists in the area of state licensing. The majority in *Freeman* distinguished that case on the ground that it "dealt with the general right to practice a profession, and did not deal with the narrower question of a right to specific employment."[155]

Judge Lay, dissenting in *Freeman*, met the tenure issue head-on:

> The majority opinion assumes that the protective cloak of the due process clause as enunciated in *Slochower* . . . does not apply to a public school teacher who is without tenure . . . . I disagree. Constitutional rights of public school teachers are not conditioned upon state tenure laws. The entire discussion of "tenure" is irrelevant to the facts here. *Slochower* does not turn upon recognition of tenure laws but upon the denial of the "protection of the individual against arbitrary action" which violates due process of law.[156]

Judge Lay felt that a school board cannot arbitrarily or capriciously refuse to renew a teacher's contract. He asserted that "the right to the specified job is not in issue; rather, the focal stake is the personal liberty to pursue one's employment without arbitrary vilification and reckless exclusion by the state."[157] The dissent further contended that the extension of this limited general due process right to the area of public employment would not result in either a flood of

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[151] *Id.*

[152] 350 U.S. 551 (1956). In *Slochower*, the Court, in a 5-4 decision, held unconstitutional the summary dismissal of a tenured teacher under a New York City Charter provision that provided for the automatic dismissal of any city employee exercising his fifth amendment privilege against self incrimination to avoid answering a question relating to his official conduct. Because no inference of guilt could be made from the exercise of the privilege, the Court found the dismissal "wholly without support." *Id.* at 559.

[153] 405 F.2d at 1159.

[154] 353 U.S. 232 (1957) (a state cannot deny a person the opportunity to take a bar examination except for reasons which are related to a valid state purpose).

[155] 405 F.2d at 1159.

[156] *Id.* at 1163.

[157] *Id.* at 1165 (emphasis omitted).

litigation or an imposed tenure system as feared by the majority. In particular, Judge Lay pointed out that "[w]hen the board's discretion is challenged, the burden of proof always remains on the plaintiff to demonstrate impermissible grounds" for the board's action.[158]

Despite the stand taken by the *Freeman* majority, the principal announced by the *Birnbaum* court has found recent application. In *Roth v. Board of Regents of State Colleges*,[159] Judge Doyle stated: "The balancing test of *Cafeteria Workers v. McElroy* [367 U.S. 886 (1960)] compels the conclusion that under the due process clause of the Fourteenth Amendment the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact . . . ."[160] He noted that this standard should be considerably less severe than the standard of "cause" as applied in the dismissal of tenured professors. Thus, it cannot be said that the prescribed protections constitute judicially-imposed tenure for all teachers. Judge Doyle then quoted the controlling language from *Birnbaum*: "[W]henever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he [cannot] be removed . . . on arbitrary grounds . . . ."[161] Judge Doyle reasserted this position with regard to elementary school teachers in *Gouge v. Joint School District*.[162]

5. *A teacher should be protected by the due process clause of the 14th amendment against a dismissal or nonretention decision which is wholly without reason.* Although the Supreme Court has never had to decide the specific question of whether a dismissal or nonretention for no reason is subject to challenge, it has had occasion to speak on the issue. In *Vitarelli v. Seaton*,[163] for example, a government employee had been suspended from the Department of the Interior as a "security risk." Although the Court ordered the employee reinstated because the secretary did not comply with departmental regulations, it indicated in dictum that there is no constitutional proscription against summary dismissal of an unprotected

158 *Id.* at 1167.

159 310 F. Supp. 972 (W.D. Wis. 1970). *See also* Hetrick v. Martin, 322 F. Supp. 545 (E.D. Ky. 1971), denying defendants' motion to dismiss a suit by a teacher whose contract was not renewed because she was "unsociable" and her assignments were "inconclusive." Mrs. Hetrick alleged that her nonretention was in fact based on her classroom discussions of the Viet Nam war and the draft system.

160 310 F. Supp. at 979.

161 *Id.*

162 310 F. Supp. 984, 991 (W.D. Wis. 1970).

163 359 U.S. 535 (1959).

employee for no stated reason.[164] One could argue, however, that since there is always a reason for action, regardless of how obscure, a dismissal that is totally unexplained and alleged to be for "no reason" is the essence of arbitrariness and capriciousness.

Chief Justice Weintraub, in his concurring opinion in *Zimmerman v. Board of Education*,[165] although refusing to pass on the question, does suggest the availability of such an argument:

> [I]f we may inquire into "unreasonableness" [of the dismissal], it would seem to follow that there must be a "reason," i.e., "cause" for refusal to continue the teacher into a tenure status. That course has its difficulties. It would not mean the court would not recognize a wide range of "reasons" or would lightly disagree with the employer's finding that the "reason" in fact existed. . . . [However, it may] involve some practical problems in the administration of a school system.
>
> I think the question might well be left for another day . . . .[166]

Support for this protection against dismissal or nonretention for no reason is found in recent cases which have held that a nontenured teacher must be informed of the charges against him prior to the termination of his employment. In both *Roth v. Board of Regents of State Colleges*[167] and *Gouge v. Joint School District*,[168] Judge Doyle expressed the view that a teacher is protected by the due process clause against nonrenewal which is "wholly without reason."[169]

The *Lucia v. Duggan*[170] case vividly exhibits the interest of the teacher in not being dismissed without reason. The court, after finding that the dismissed teacher had "attempted unsuccessfully to secure employment elsewhere as a public school teacher,"[171] stated: "It is fairly inferable that one reason, if not the only one, why plaintiff has been unable to secure employment as a public school teacher is because he was dismissed by the . . . school committee for no stated reasons."[172]

Moreover, under a dismissal or nonretention for no reason, it is more difficult for the teacher to prove that the motive of the school administration was constitutionally proscribed. And knowing that

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164 *Id.* at 539-40.

165 38 N.J. 65, 183 A.2d 25 (1962), *cert. denied*, 371 U.S. 956 (1963).

166 *Id.* at 80, 183 A.2d at 33 (concurring opinion).

167 310 F. Supp. 972 (W.D. Wis. 1970).

168 310 F. Supp. 984 (W.D. Wis. 1970).

169 310 F. Supp. at 979, 991.

170 303 F. Supp. 112 (D. Mass. 1969).

171 *Id.* at 116.

172 *Id.*

it must give a reason for its actions, the administration will be wary of dismissing a teacher for exercising a specific constitutional right.

It might be argued that requiring that dismissal or nonretention be based upon some stated reason affords the nontenured teacher the full protection enjoyed by tenured teachers, who can be dismissed only for cause. This argument was recently met by the Rhode Island commissioner of education in *Domenicone v. School Committee.*[173] There, a probationary teacher, after requesting a statement of charges and a hearing concerning nonrenewal of his contract, was told by the school board that such notice and a hearing were afforded only to tenured teachers or to teachers dismissed during the school year, and not to probationary teachers whose contracts were not renewed. The commissioner of education did not accept this distinction: "The provision in the [state statute] . . . which states that a teacher who has acquired tenure shall not be dismissed without good and just cause should not be construed to imply that a teacher who has not acquired tenure may be dismissed without cause."[174] But the commissioner did believe that the cause for dismissal of a nontenured teacher could be less than that required to dismiss a tenured teacher. He concluded that "simple justice as provided not only by the laws of this state but by the Constitution of the United States demands that [the teacher] know the cause for dismissal or non-renewal of contract."[175]

6. *With regard to a teacher's substantive due process protections, it should be immaterial whether his employment is terminated during a given contract period, or not renewed for a subsequent period.* In *Jones v. Hopper*[176] the petitioner relied on *Bomar v. Keyes*[177] in support of the contention that he was denied an "expectancy" of continued employment when his contract was not renewed. Noting that Bomar, a nontenured teacher, was dismissed during her contract period, the *Jones* court distinguished that case on the ground that the "interest" protected was a contract of employment and the "expectancy" was that of continuing employment until the expiration of the contract. The *Jones* court found no "interest" to be pro-

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[173] Opinion of the Rhode Island Commissioner of Education (May 20, 1970), *reviewed in* 48 NEA RESEARCH BULL. 90 (Oct. 1970).

[174] *Id.*, 48 NEA RESEARCH BULL. at 91-92.

[175] *Id.*, 48 NEA RESEARCH BULL. at 92.

[176] 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

[177] 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947).

tected where nonrenewal of a nontenured teacher's contract is based on arbitrary or retaliatory reasons.[178]

Better reasoned opinions were given in the *Roth v. Board of Regents of State Colleges*[179] and *McLaughlin v. Tilendis*[180] cases, where the courts found that substantive constitutional protection makes no distinction as to "whether employment is terminated during a given contract period, or not renewed for a subsequent period."[181] And in *Domenicone v. School Committee*,[182] the commissioner stated that the only difference between nonrenewal and discharge is the point in time of the action taken against the teacher; therefore, in practice they are the same. Although the *Roth* and *McLaughlin* courts were referring to the protection of first amendment rights, the same protection should be afforded to any rights which have emerged as substantive due process requirements. A nontenured teacher's protection against actions which are arbitrary, capricious, without basis in fact, or, as in *Domenicone*, for no stated reason, should apply in both dismissal and nonrenewal situations.

In summary, the evolving guidelines for substantive due process require that where the dismissal or nonretention of a faculty member, tenured or nontenured, impinges upon a specific constitutional right, the state shall not prevail unless it can show that the teacher's exercise of such a constitutionally protected right harms a substantial public interest. Of course, this requires a rational connection between the proscribed activity and the particular interests of the educational system. Where no specific constitutional right is at issue, but rather the administration's action is arbitrary, capricious, without basis in fact, or based upon no stated reason, the courts have looked to other factors such as damage to reputation and career opportunities in order to invoke the due process clause. Although the courts differ in their results where the balancing does not involve specific (positive) constitutional rights, the more progressive courts have recognized that dismissal or nonretention for arbitrary or capricious reasons, or for no reason, can effectively mask a constitutionally impermissible discharge. Where the hidden reason for such a discharge is the teacher's exercise of a first amendment right, the

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178 410 F.2d at 1327-29.

179 310 F. Supp. 972 (W.D. Wis. 1970).

180 398 F.2d 287 (7th Cir. 1968).

181 310 F. Supp. at 976; *see* 398 F.2d at 289.

182 Opinion of the Rhode Island Commissioner of Education (May 20, 1970), *reviewed in* 48 NEA RESEARCH BULL. 90, (Oct. 1970).

dismissal or nonretention could have a significant chilling effect on the exercise of those rights by nontenured teachers.[183]

C. *Procedural Due Process*

In order to properly safeguard a person's substantive rights, the due process clause provides that certain procedural requirements must be satisfied. As Mr. Justice Frankfurter once observed: "The history of liberty has largely been the history of observance of procedural safeguards."[184] Nevertheless, the Supreme Court has been somewhat vague in dealing with the procedural rights of government employees. Moreover, in the area of education, administrators have effectively argued that the question of a teacher's competence is one peculiarly within the discretion of the teacher's superiors since such competence is judgmental and is not readily susceptible to factual determination in an adversarial proceeding. However, as the courts more clearly articulate constitutional principles of procedural due process and recognize that even sincere administrators are often arbitrary, they are becoming more dubious of the academic administrator's assertion that the esoteric relationship between the administration and the teacher should not be subject to judicial review. This trend is evinced by the increasing number of cases in which the courts are recognizing the teacher's right to 14th amendment procedural due process protections.[185] The protections discussed below have emerged from such cases.

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183 Generally, first amendment freedoms, and the chilling thereof, have been scrupulously protected. *See* Dombrowski v. Pfister, 380 U.S. 479 (1965); Smith v. California, 361 U.S. 147 (1959); Thornhill v. Alabama, 310 U.S. 88 (1940).

184 McNabb v. United States, 318 U.S. 332, 347 (1943). Historically, procedural due process may be traced directly as far back as 1215 when, in the Magna Carta, the Crown agreed, as to a limited class of persons, not to proceed summarily but only after notice and a hearing given in accordance with "the law of the land."

185 *See, e.g.*, Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969). "The particular circumstances of a dismissal of a public school teacher provide compelling reasons for application of a doctrine of procedural due process." *Id.* at 118. *See also* Roth v. Board of Regents of State Colleges, 310 F. Supp. 972 (W.D. Wis. 1970); Gouge v. Joint School Dist., 310 F. Supp. 984 (W.D. Wis. 1970). *But cf.* Vitarelli v. Seaton, 359 U.S. 535 (1959), where the Court implied that so long as procedural rules for the dismissal of government employees (here an unprotected employee of the Department of the Interior) are present, the administrator must comply with those procedures; absent such rules, the Constitution places no restrictions on dismissals of unprotected employees.

Mr. Justice Brennan's dissenting opinion in Cafeteria Workers v. McElroy, 367 U.S. 886, 899 (1961), reveals the vulnerability of government employees' substantive rights in the absence of procedural safeguards. In that case the majority upheld the summary dismissal of a short-order cook employed at a defense plant because she failed to meet certain regulatory and contractual "security requirements." Mr. Justice Brennan observed:

1. *Notice of the specific reasons for the institution's intended nonretention of the teacher is required.* The inference is present in several cases that information as to cause and an opportunity to dispute the stated cause must be afforded where the dismissal will grievously affect the public employee's career opportunities. In *Birnbaum v. Trussell*,[186] the court stated that "whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he [cannot] be removed . . . without a procedure calculated to determine whether legitimate grounds do exist."[187] In a footnote, the court further stated: "It is clear that [the] refusal to give appellant a copy of the charges was as much a denial of his rights as an absolute refusal to allow him a hearing."[188]

In *Lucia v. Duggan*,[189] the plaintiff was not told that his refusal to remove his beard would result in his dismissal. Plaintiff was forced to guess what the charges against him were and what action, if any, the school committee might take. The court, finding a violation of due process stated: "On the latter point, at least, plaintiff may have guessed wrong. No reason has been advanced by the defendants as to why plaintiff should have been forced to make these guesses."[190]

In *Roth v. Board of Regents of State Colleges*,[191] Judge Doyle stated: "Substantive constitutional protection for a university professor against nonretention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards. . . . [M]inimal procedural due process includes a statement of the

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[T]he mere assertion by government that exclusion is for a valid reason forecloses further inquiry. That is, unless the government official is foolish enough to admit what he is doing — and few will be so foolish after today's decision — he may employ "security requirements" as a blind behind which to dismiss at will for the most discriminatory of causes.

Such a result in effect nullifies the substantive right — not to be arbitrarily injured by Government — which the Court purports to recognize. What sort of a right is it which enjoys absolutely no procedural protection? *Id.* at 900.

186 371 F.2d 672 (2d Cir. 1966).

187 *Id.* at 678.

188 *Id.* at 679 n.15. "Whatever knowledge Dr. Birnbaum may have gleaned about the charges against him from hospital rumors was not the 'notice' which the due process clause requires. A party against whom the Government is proceeding is entitled to be apprised by the Government, with some precision and specificity, of its reasons for so doing." *Id.*

189 303 F. Supp. 112 (1969).

190 *Id.* at 118.

191 310 F. Supp. 972 (W.D. Wis. 1970).

reasons why the university intends not to retain the professor . . . ."[192] The same principle was held to apply to elementary school teachers in *Gouge v. Joint School District*.[193]

In a decision of the Court of Appeals for the Fifth Circuit, *Ferguson v. Thomas*,[194] the rights of a nontenured teacher to procedural due process were again considered. Although in this instance the dismissal of a university professor for cause was upheld, the appellate court listed the minimal requirements of procedural due process for one who has an expectancy of continued employment. Where the termination for cause is opposed, these requirements include notice of "the cause or causes for termination in sufficient detail to fairly enable [the teacher] to show any error that may exist . . . ."[195]

2. *The teacher should be given a hearing and notice thereof.* Generally speaking the courts do not delineate a right to notice of a hearing separate from a right to the hearing itself. But it has been specifically stated in both the *Roth* and *Gouge* cases that minimal procedural due process requires that "notice of a hearing" be provided the teacher.[196] Of course, the right to notice of a hearing will be dependent upon finding a right to the hearing itself.

In *Birnbaum* the court noted the significance of a hearing when it stated that "it is readily apparent that whatever injury appellant has suffered was a result of his being denied a hearing. . . . [A] full hearing was the only way appellant's substantial interests could have been protected . . . ."[197] The court held that denial of such a hearing afforded Birnbaum a right of action for injuries suffered in consequence thereof.[198] The courts in *Roth*, *Gouge*, and *Ferguson* also found that minimal procedural due process includes a hearing.[199]

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[192] *Id.* at 979-80. The *Roth* court was quick to point out that "[i]t should clearly be understood that any more stringent requirements imposed by statute, custom, or otherwise, such as a showing of 'cause' in the case of a tenured professor, are unaffected by this statement of minimal procedural requirements embodied in the due process clause of the Fourteenth Amendment." *Id.* at 980 n.3.

[193] 310 F. Supp. 984, 992 (W.D. Wis. 1970).

[194] 430 F.2d 852 (5th Cir. 1970).

[195] *Id* at 856, *followed in* Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970) (nontenured principal with 11 years of employment in the school system should have been accorded *Ferguson* minimal due process standards when his 1-year contract was not renewed after he criticized the school board at a PTA meeting).

[196] Roth v. Board of Regents of State Colleges, 310 F. Supp. 972, 980 (W.D. Wis. 1970); Gouge v. Joint School Dist., 310 F. Supp. 984, 992 (W.D. Wis. 1970).

[197] Birnbaum v. Trussell, 371 F.2d 672, 679 (2d Cir. 1966).

[198] *Id.*

[199] Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970); Roth v. Board of Regents of State Colleges, 310 F. Supp. 972, 980 (W.D. Wis. 1970); Gouge v. Joint School Dist., 310 F. Supp. 984, 992 (W.D. Wis. 1970).

In contrast, the Supreme Court, in *Cafeteria Workers v. McElroy*,[200] upheld the denial of a hearing to a short-order cook who had been dismissed because she did not meet the "security requirements" of the defense plant where she worked. The Court stated that it was satisfied that "under the circumstances of this case such a procedure was not constitutonally required."[201] However, in a vigorous dissent, Mr. Justice Brennan, quoting from *Joint Anti-Fascist Refugee Committee v. McGrath*,[202] stated: "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."[203]

A more recent example of a court upholding the denial of a hearing may be found in *DeCanio v. School Committee*.[204] The Supreme Court of Massachusetts, adhering to the majority opinion in *Cafeteria Workers* and disagreeing with the *Roth* and *Gouge* decisions, upheld a lower court decision denying six nontenured teachers the right to a hearing. The teachers had been suspended for 7 days due to their unauthorized absence when they joined parents and citizens in a "liberation school." At a hearing on the suspensions, their request for a continuance and a public hearing was denied, the school committee voting instead to terminate the teachers' contracts. The committee also voted to hold a closed hearing on the dismissals, but the teachers declined to attend. (Due to lack of notice of the specific charges against the plaintiffs, the trial judge did not view this refusal to attend the closed hearing as a waiver by the teachers.) Instead, they brought a suit seeking reinstatement.[205]

The teachers contended that the lack of a hearing on the dismissal deprived them of due process. The Massachusetts court disagreed with the decision of the district court in the *Roth* and *Gouge* cases and said that it "chose to follow the greater weight of authority," noting that "[m]ost of the cases in which the question [of the dismissal of a nontenured teacher] has been considered have concluded that in the absence of a statute to the contrary a probationary

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200 367 U.S. 886 (1961).

201 *Id.* at 894.

202 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

203 367 U.S. at 901.

204 260 N.E.2d 676 (Mass. 1970), *cert. denied*, 39 U.S.L.W. 3374 (U.S. Mar. 2, 1971). It should be noted that subsequent to the *DeCanio* decision the Massachusetts legislature enacted statutory changes granting additional rights to probationary teachers. *See* MASS. GEN. LAWS ANN. ch. 71, §§ 42, 42B (Supp. 1971).

205 260 N.E.2d at 678.

teacher may be dismissed without a hearing."[206] The court concluded that the Massachusetts statute, which provided a hearing to tenured teachers but not to nontenured teachers, did not violate the Constitution of the United States.[207]

3. *The teacher should have the opportunity to be present at the hearing and respond to the stated reasons for nonretention.* A significant case dealing with the right to confrontation is *Greene v. McElroy*.[208] In *Greene* the Government's revocation of an aeronautical engineer's security clearance, without a full hearing, resulted in termination of his employment. The Supreme Court held that the security clearance revocation, which was based on information received from unidentified persons, deprived Greene of "the traditional procedural safeguards of confrontation and cross-examination."[209] In so deciding, the Court stated that among "relatively immutable" principles of our jurisprudence is one which holds that "where governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[210]

The rule espoused in *Greene* has likewise been followed in cases involving teachers. In the *Roth* case, for example, the court held "that minimal procedural due process includes . . . a hearing at which [the teacher] may respond to the stated reasons [for nonretention] . . . if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons."[211] The same prin-

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[206] *Id.* at 680-81.

[207] *Id.* at 681.

[208] 360 U.S. 474 (1959).

[209] *Id.* at 493.

[210] *Id.* at 496.

[211] Roth v. Board of Regents of State Colleges, 310 F. Supp. 972, 980 (W.D. Wis. 1970).

Although the courts do not appear to have dealt with the issue, it seems clear that the nontenured teacher's right to be present at the hearing should be complimented by the right to also have legal counsel present at the hearing. The right to counsel serves to insure that the teacher is afforded maximum fairness at the hearing and that his interests are most effectively served by his appearance. Committee A of the American Association of University Professors (AAUP) has alluded to the nontenured teacher's right to counsel in its 1968 *Recommended Institutional Regulations on Academic Freedom and Tenure*, 54 A.A.U.P. BULL. 448 (1968). Section 10 of the proposed regulations provides that where a nontenured faculty member "alleges that considerations violative of academic freedom significantly contributed to a decision not to reappoint him" and his allegations have not been resolved by informal methods, if the appropriate "committee so recommends, the matter will be heard in the manner set forth in Regulations 5 and 6 . . . ." *Id.* at 451. Sestion 5(c)(3), one of the regulations referred to

ciple was held to apply to elementary school teachers in *Gouge*. And in *Ferguson*, the fifth circuit stated that the nontenured teacher "must be accorded a meaningful opportunity to be heard in his own defense . . . ." In this respect he must be "advised of the names and nature of the testimony of witnesses against him . . . ."[212]

In summary, the emerging substantive rights of nontenured teachers can be realized only if they are protected by the procedural due process requirements of (1) notice of the specific reasons for dismissal or nonretention, (2) a hearing on those reasons and notice of such a hearing, and (3) the opportunity to be present at the hearing and to respond to the stated reasons for dismissal or nonretention. These procedural requirements are basic standards which the more sagacious courts have recognized as being necessary to protect the teacher's interests.

The requirements discussed above are by no means exhaustive of the procedural safeguards which could be invoked to protect the substantive rights of teachers. There has been judicial reference to more refined procedural requirements which would further protect the interests of faculty members. Those suggested safeguards would require (1) that the ultimate decision of the board rest upon the charges of which the teacher was notified,[213] (2) that the ultimate decision of the board be based on a finding of facts which were submitted at the hearing,[214] and (3) that the hearing be held by an impartial tribunal.[215] Although even the most prescient courts have not uniformily recognized these broader requirements, the adoption

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above, provides: "During the proceeding the faculty member will be permitted to have an academic advisor and counsel of his own choice." *Id.* at 450.

212 Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).

213 In Gouge v. Joint School District, 310 F. Supp. 984 (W.D. Wis. 1970), Judge Doyle stated that the "necessary corollary" to the requirement of a statement of the charges against a nontenured teacher is that "the Board's ultimate decision may not rest on a basis of which the teacher was never notified nor may it rest on a basis to which the teacher had no opportunity to respond." *Id.* at 992.

214 "[T]he district court . . . must judge the constitutionality of [the Board's] action on the basis of the facts which were before the Board and on its logic." Johnson v. Branch, 364 F.2d 177, 181 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

The district court opinion of the *Johnson* case, 242 F. Supp. 721 (E.D.N.C. 1965), reveals the disadvantage of not having a full record of the initial hearing. As is often the case, the trial court had to conduct an extended finding of facts de novo to determine what facts were before the board when it decided not to renew the plaintiff's contract.

215 In Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970), the Court of Appeals for the Fifth Circuit said that teachers with an expectancy of reemployment should be afforded a "hearing . . . before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges." *Id.* at 856.

of such safeguards may be forthcoming if the courts seek to fully protect the interests of nontenured teachers.

School authorities might argue that the emerging protections for nontenured teachers demand that every teacher be afforded the elaborate and time-consuming procedures formerly required only in the discharge of tenured teachers. It might thus be urged that the burden of preparing for, and actually conducting, numerous adversarial hearings, as well as the publicity surrounding such proceedings, would seriously disrupt the school's educational activities. Although it is true that the evolving procedural requirements for nontenured teachers do place additional demands upon school authorities, there are several factors which should prevent these demands from seriously interfering with the educational process. Initially, it must be remembered that the burden of proof and the burden of going forward at the hearing remain on the nontenured teacher who challenges his nonretention.[216] Because these burdens remain with the teacher, school authorities will not be required to prepare a full and persuasive case comparable to that required where a tenured teacher is discharged. Moreover, the undesirable publicity surrounding the hearings could be mitigated by the frequent use of *in camera* proceedings. Finally, the procedural requirements discussed above are not intended to foreclose the opportunity for the nontenured teacher to knowingly and voluntarily waive his procedural rights when he is informed of the decision not to reemploy him.[217]

Regardless of the ultimate refinements of the procedural safeguards and the degree of judicial involvement therewith, educational

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[216] In Roth v. Board of Regents of State Colleges, 310 F. Supp. 972 W.D. Wis. 1970), Judge Doyle stated:

> The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact. *Id.* at 980.

[217] *See id.* at 980 n.2, where Judge Doyle noted:

> I do not intend to foreclose more considerate procedures, which permit the professor to waive procedural rights, voluntarily and knowingly. For example, the initial notice that non-retention is being considered may say that if the professor makes a written request, within a stated interval, a written statement of reasons will be supplied him, and that he will be provided with hearing at which he may respond; otherwise, he will simply be furnished with a letter announcing the decision without a statement of reasons. Also, even at the point at which a written statement of reasons is furnished, the professor may be advised that, if he makes a request for a hearing within a stated interval, a hearing will be scheduled; otherwise, the procedure will end with the written notice of non-retention and the reasons therefor.

institutions at all levels should take it upon themselves to insure that procedural due process is afforded to all of their teachers. The confidence that the educational institution's constituents place in a fair hearing militates that such procedural protection be recognized not only for the benefit of the teacher, but also for the benefit of the school itself by insuring that the integrity of its educational system is being maintained.

V. CONCLUSION

Academic freedom — enveloping the freedoms of study, research, opinion, discussion, expression, publication, speech, teaching, writing, and communication — is a fundamental element of the infrastructure of a democratic society which can only be adequately protected where the proclivity to arbitrary administrative action is effectively precluded. Thus, the courts, recognizing that "[a]cademic freedom would avail us little if those teachers most likely to exercise it may be weeded out of the scholastic garden before they fall within the protective embrace of the tenure statutes,"[218] are securing both the tenured and nontenured teachers' substantive and procedural due process protections. In this process the more enlightened court decisions suggest that too often questions concerning the particular state's tenure or contract law vis-a-vis the teacher serve to obfuscate the *raison d'etre* of the due process clause: "[D]ue process of law is not for the sole benefit of an accused. It is the best insurance . . . against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* considerations."[219]

The court opinions which recognize the pervasive nature of the due process clause as a protector of both man's dignity[220] and the integrity of a system of justice[221] have the force of an idea whose time has come. The concept of constitutional tenure brings the copious benefits of academic freedom closer to realization for all of society.

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[218] Frakt, *Non-tenured Teachers and the Constitution*, 18 KAN. L. REV. 27 (1969).

[219] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224-25 (1953) (Jackson, J., dissenting).

[220] Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 YALE L.J. 319, 347 (1957).

[221] *Id.* at 346.